

2004

Tom Heal Commercial Real Estate, Inc. v. Glen Overton and Zions Holding Company, L.C. : Brief of Appellees

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

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TOM HEAL COMMERCIAL REAL)
ESTATE, INC.,)

Plaintiff /Appellant,)

v.)

GLEN OVERTON and ZIONS)
HOLDING COMPANY, L.C.,)

Defendants/ Appellees.)

Appellate Court No. 20040519

**UTAH COURT OF APPEALS
BRIEF**

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BRIEF OF APPELLEES

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, UTAH, THE
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ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3-4
APPELLATE JURISDICTION.....	5
ISSUES PRESENTED ON APPEAL.....	5
DETERMINATIVE LAW.....	6
STATEMENT OF THE CASE.....	6-8
STATEMENT OF THE FACTS.....	9-12
SUMMARY OF ARGUMENT.....	11
ARGUMENT.....	11
I. Heal’s Interpretation of the Agreement is Inconsistent with Established Legal Precedent in the State of Utah Regarding Contract Interpretation.....	11
A. Contract Interpretation in Utah in General.....	11
B. Heal Concedes that The Agreement is Unambiguous and Therefore Resort to Extrinsic Evidence is Unnecessary.....	13
C. Heal’s Interpretation of the Agreement Fails to Consider and Harmonize Sections 2 and 3 in the Agreement.....	14
D. The Purpose of the Protection Period is to Relieve Zion’s of the Burden of Paying Duplicative/Unearned Commissions.....	16
E. The District Court’s Interpretation of the Agreement as Drafted by Heal is Fair and Equitable and the Agreement Fails to Expressly or Unequivocally Provide for the Payment of a Commission in Perpetuity.....	17
F. The Court Cannot Change the Bargain Between the Parties on the Basis of Supposed Equitable Principles	19
II If this Court Reverses the District Court, Heal may be Entitled to an Award of Attorney’s Fees.....	21
CONCLUSION.....	21
ADDENDUM and CERTIFICATE OF SERVICE.....	23-24

TABLE OF AUTHORITIES

CASES:

<i>Bakowski v. Mountain States Steel, Inc.</i>	12
<i>Biesinger v. Behunin</i> , 584 P. 2d 801 (Utah 1978).....	20
<i>Big Cottonwood Tanner Ditch Co. v. Salt Lake City</i> , 740 P.2d 1357 (Utah App)...14-15	
<i>Dalton v. Jerico Construction Co.</i> , 642 P.2d 748, 750 (Utah 1982)	20
<i>Davies v. Olson</i> , 746 P.2d 264, 268 (Utah App. 1990).....	20
<i>Equitable Life & Cas. Ins. Co. v. Ross</i> , 849 P.2d 1187 (Utah App. 1993).....	19
<i>Fairbourne Commercial v. American Housing</i> , 94 P.3d 292 (Utah 2004).....	6,12, 14, 15
<i>Faulkner v. Farnsworth</i> 665 P.2d 1292, 1293 (Utah 1983).....	12
<i>GGA, Inc. v. Laventis</i> , 773 P.2d 841 (Utah App. 1989).....	15
<i>Green River Canal Co., v. Thayn</i> , 84 P.3d 1134, 1140 (Utah 2003)	5,6,12,14, 18
<i>Hal Taylor Associates v. UnionAmerica, Inc.</i> , 657 P.2d 743, 749 (Utah 1982).....	20
<i>Jones. v. Hinkle</i> , 611 P.2d 733 (Utah 1980).....	15
<i>Larrabee v. Royal Dairy Products Co.</i> , 614 P.2d 160 (Utah 1980).....	14
<i>Nagle v. Club Fountainbleu</i> , 405 P.2d 346, (Utah 1965).....	17
<i>Olson v. Park-Craig-Olson, Inc.</i> , 815 P.2d 1356, 1360 (Utah App. 1991).....	20
<i>Provo City Corp., v. Nielsen Scott Co.</i> , 603 P.2d 803, 806 (Utah 1979).....	20
<i>Realty World Labrum v. Steadman</i> , 737 P.2d 165 (Utah 1987.....	16-17
<i>Rio Algom Corp. V. Jimco Ltd.</i> , 618 O.2d 497, 505 (Utah 1980).....	20

<i>Tomino v. Greater Park City Co.</i> , 570 P.2d 698 (Utah 1977)	20
<i>Winegar V Froerer Corp.</i> , 813 P.2d 104, 108 (Utah 1991).....	6,12,14
<i>Zion’s First Nat. Bk., v. Nat. Am. Title Ins.</i> , 749 P.2d 651, Utah 1988).....	6

STATUTES AND RULES:

U.C.A.) Section 78-2a-3(2)(j).....	5
U.C.A. Section 78-2-2(4).....	5
U.C.A. Section 78-27-56.5.....	11
Utah Rules of Civil Procedure Rule 4(d)(3)(c).....	9
Utah Rules of Civil Procedure 56(c).....	5
Utah Rules of Appellate Procedure 24(a)(11).....	23

APPELLATE JURISDICTION

Utah Code Annotated (hereinafter U.C.A.) Section 78-2a-3(2)(j) gives this Court jurisdiction pursuant to the Order of the Supreme Court of the State of Utah dated June 22, 2004, transferring this case from the Supreme Court to the Utah Court of Appeals pursuant to U.C.A. Section 78-2-2(4).

ISSUES PRESENTED ON APPEAL

1. Whether the District Court correctly interpreted the Agreement and specifically the interpretation of paragraph two (2) of the Agreement and its relationship, or lack thereof, to paragraph three (3) of the Agreement, relative to the meaning and purpose of the protection period clause.

STANDARD OF REVIEW

The trial court's interpretation of a contract, including questions not requiring resort to extrinsic evidence, present a question of law which this Court reviews for correctness. This Court also reviews for correctness the trial court's grant of summary judgment pursuant to Utah R. Civ. P. 56(c) and affords no deference to its legal conclusions. *Green River Canal Co., v. Thayn*, 84 P.3d 1134, 1140 (Utah 2003) and *Zion's First Nat. Bk., v. Nat. Am. Title Ins.*, 749 P.2d 651, Utah 1988). When a trial court's findings arise from "stipulated facts" such findings are tantamount to conclusions of law, with the stipulation of facts being the functional equivalent of true findings of fact. *Id.* at 656.

DETERMINATIVE LAW

1. Contract Interpretation

- *Fairbourne Commercial v. American Housing*, 94 P.3d 292 (Utah 2004).

- *Green River Canal Co., v. Thayn*, 84 P.3d 1134, 1140 (Utah 2003).

- *Winegar V Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991).

- *Zion's First Nat. Bk., v. Nat. Am. Title Ins.*, 749 P.2d 651, (Utah 1988).

STATEMENT OF THE CASE

Nature of the Case. The nature of the case is a contract dispute involving the interpretation of a listing agreement relative to liability for a claimed commission owed to the realtor.

Course of Proceedings. This action was precipitated by the filing of a complaint by Tom Heal Commercial Real Estate, Inc. (Hereinafter "Heal"). Heal's Complaint alleged among other things, breach of contract by Defendants, Glen Overton (hereinafter "Overton") and Zion's Holding Company, L.C., (hereinafter "Zions") a Utah limited liability company. The scope of these proceedings may be separated and identified in three separate phases as follows. (1) Litigation on allowance/disallowance of the underlying claimed commission to Heal, (2) the premature filing of a notice of appeal by Heal prior to the resolution of issues relating to allowance of attorney's fees, and (3) the appeal of the trial court's decision granting the motion to dismiss and allowing attorney's fees.

Zion's responded to Heal's Complaint by filing a motion to dismiss (hereinafter

“Motion”) on or about October 7, 2003. Heal opposed Zion’s Motion by filing a memorandum in opposition (hereinafter “Response”) thereto accompanied by the Affidavit of Tomas W. Heal. (Hereinafter “Heal Affidavit”). Thereafter, Zion’s filed its Reply Memorandum to Plaintiff’s Response to Zion’s Holding Company, L.C.’s Motion to Dismiss. (Hereinafter “Reply”). Thereafter, Heal filed a “Surreply” to Zion’s Reply.¹ Zion’s then filed its Reply to Heal’s Surreply and the matter was set for hearing for December 12, 2003.²

Disposition Below. The District Court granted Zion’s Motion. The gist of Zion’s Motion was that there was relationship between paragraphs 2 (Brokerage Fee) and 3 (Protection Period) inasmuch as the latter specifically references the former in the Listing Agreement & Agency Disclosure, (hereinafter “Agreement”). The interpretation of that Agreement and these two clauses is at the heart of this appeal. Zion’s argued that the Protection Period clause, when harmonized with the Brokerage Fee clause, was designed to protect Heal’s right to a commission for a finite period of time—i.e., two (2) years after the termination of the Agreement. Since the Agreement had expired on its own terms, no

¹ Zion’s Reply raised new issues outside of the Motion and both counsel agreed to the filing of the Surreply in order that the Motion and all issues related thereto be considered and resolved in one hearing.

² Prior to the hearing of the Motion on December 12, 2003, Heal filed a Motion to Serve Summons and Complaint on Defendant Overton Pursuant to Rule 4(d)(3)(c). (Hereinafter “Heal Service Motion”). The Court heard oral argument on the Heal Service Motion which had been briefed and granted it. The Heal Service Motion is largely irrelevant to the issues on appeal.

commission was owed. Heal's interpretation of the two clauses, on the other hand, was that such a commission was owed in perpetuity anytime there was a "lease renewal."

Following the Court's decision on the Zion's Motion, Zion's filed an affidavit seeking attorney's fees and costs as allowed by the Agreement. The Affidavit of Steven F. Allred in Support of Fees and Costs (hereinafter "Allred Affidavit") was filed on or about January 14, 2004. A hearing was conducted by the Court on the Allred Affidavit on April 22, 2004. At the conclusion of the hearing the Court granted the fees and costs requested in the Allred Affidavit (\$5061.00) less \$493.00 dollars. The Allred Affidavit was supplemented in the amount of \$2,426.50 for fees and costs incurred by Zion's in seeking and obtaining dismissal of a premature notice of appeal filed by Heal.³ It was further supplemented in the amount of \$1276.00 in preparing Findings of Fact (hereinafter "Findings") and Conclusions of Law ⁴ (hereinafter "Conclusions") filed by Zion's for a total award of \$8,270.50.

³ Heal filed his first Notice of Appeal on or about January 9, 2004—nearly three (3) months prior to the hearing on the issue of attorney's fees. On January 14, 2004, Zion's counsel corresponded with Heal's attorney and provided authority for his position that the appeal was premature and requested dismissal. Zion's request went unheeded by Heal. Zion's filed a motion to dismiss in the District Court and at the Court of Appeals in response to the latter's *Sua Sponte* Motion for Summary Disposition. On February 20, 2004, the Court of Appeals dismissed Heal's first appeal.

⁴ Zion's spent considerable time preparing draft findings of fact and conclusions of law subsequent to the April 22, 2004, fee hearing. The parties, after much discussion, including the input of the trial court judge, stipulated to the Findings and Conclusions and certified the same.

STATEMENT OF THE FACTS

1. Zion's is a Utah limited liability company, separate and distinct from its members and validly formed on or about February 2, 1997. *See* Addendum attached hereto. (Findings, Paragraph 1).

2. On or about June 30, 1999, Heal prepared and Zion's executed a "LISTING AGREEMENT AND AGENCY DISCLOSURE," (hereinafter "Agreement") a copy of which is attached hereto as Exhibit "B." (Findings, Paragraph 2).

3. The Agreement identifies "the Seller" as "Glen Overton\ and his interests." (Findings, Paragraph 3).

4. The Agreement provides for a listing period beginning June 23, 1999 and ending on September 23, 1999. (Hereinafter "the Listing Period"). (Findings, Paragraph 4).

5. Paragraph 2 in the Agreement mandates the payment of commissions to Heal by Zion's for a "lease" or "lease renewal." (Findings, Paragraph 5).

6. Paragraph 3 in the Agreement provides for protection of payments to Heal under the Agreement for a period of twenty-four months (hereinafter "the protection period") following the expiration of the Agreement. (September 23, 1999). (Findings, Paragraph 6).

7. On or about July 30, 1999, Heal provided Zion's with a tenant, Selnate U.S.A. Co. Ltd., for a three (3) year period. (August 1, 2002). (Findings, Paragraph 7).

8. On April 15, 2003, Zion's executed a second Lease Agreement

(hereinafter “lease renewal”) for a period of two (2) years.(Findings, Paragraph 8).

9. Heal demanded a commission from Zion’s for the lease renewal and Zion’s refused to pay said commission on the basis that the lease renewal was entered outside of the expiration of the Agreement and the protection period.(Findings, Paragraph 9).

10. Defendant, Glen Overton, (hereinafter “Overton”) an individual and member of Zion’s resides outside of Utah and has been properly served in this action.(Findings, Paragraph 10).

11. Zion’s has submitted the Affidavit of Steven F. Allred in Support of Fees and Costs (hereinafter “Affidavit”).(Findings, Paragraph 11).

12. The Affidavit requests fees and costs in the amount of \$5061.00 in conjunction with Zion’s motion to dismiss and in opposition to Heal’s motion to effect service on Overton by federal express up through and including January 7, 2004.(Findings, Paragraph 12).

13. The Affidavit has been supplemented orally and informally by Zion’s in the amount of \$2, 426.50 for fees and costs incurred with respect to the filing of the premature notice of appeal by Heal and for services incurred in conjunction with the amendment of these findings and an order of the Court through April 22, 2004. Additional fees have been incurred in obtaining entry of an order.(Findings, Paragraph 13).

14. Zion’s corresponded with Heal on two separate and distinct occasions

and attempted unsuccessfully to persuade Heal to dismiss his complaint and appeal or risk being liable for fees and costs pursuant to U.C.A. Section 78-27-56.5 . (Findings, Paragraph 14).

SUMMARY OF ARGUMENT

The District Court properly interpreted the Agreement in accordance with established Utah precedent relating to the interpretation of a contract. Thereafter the parties stipulated to appropriate findings of fact and conclusions of law. Such interpretation, among other things, includes a determination of the four corners of the Agreement to determine ambiguity, clarity, intent, harmony, purpose, and fairness within the plain meaning of the words utilized by the drafter and avoidance of harsh interpretations or rewriting or supplying missing terms. Based on consideration of all of the above, without need or resort to extrinsic evidence, the District Court was correct in determining that the Agreement does not provide for a commission payment in perpetuity to Heal on any lease renewal.

ARGUMENT

1. Heal's Interpretation of the Agreement is Inconsistent with Established Legal Precedent in the State of Utah Regarding Contract Interpretation.

A. Contract Interpretation in Utah in General.

The District Court utilized the correct and appropriate analysis in finding and concluding that the Agreement is not ambiguous by looking at the four (4) corners of the

document, that there is no need to resort to extrinsic evidence, that contract provisions within the Agreement are to be harmonized together, and interpreting the Agreement so as not to yield inequitable results. *See Green River Canal Co., v. Thayn*, 84 P.3d 1134 (Utah 2003). The District Court's Conclusions, Paragraphs 4-7 identify and contain the proper analysis. Conversely, Heal's interpretation of the Agreement is inconsistent with such analysis.

In *Fairbourne Commercial v. American Housing*, 94 P.3d 292 (Utah 2004) the Utah Supreme Court coincidentally examined a similar listing agreement between a broker and a vendor. The broker sued the vendor to recover a commission. The trial court interpreted the listing agreement and found that the vendor owed the broker a commission. The vendor appealed. On appeal the Utah Supreme Court reaffirmed the correct analysis when interpreting a contract as a matter of law. The Court stated:

When interpreting a contract, a court first looks to the contract's four corners to determine the parties' intentions, which are controlling. If the language within the four corners of the contract is unambiguous...a court determines the parties' intentions from the plain meaning of the contractual language as a matter of law...A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies...When interpreting a contract a court is to consider each provision in "relation to all of the others, with a view toward giving effect to all and ignoring none. (Emphasis added).

Fairbourne at 295 citing to *Bakowski v. Mountain States Steel, Inc.*, 15 P.3d 1179 (Utah 2004); *Winegar V Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991) (quoting *Faulkner v. Farnsworth* 665 P.2d 1292, 1293 (Utah 1983); *Green River Canal Co., v. Thayne*, 84 P.3d 1134 (Utah 2003).

**B. Heal Concedes that The Agreement is Unambiguous and
Therefore Resort to Extrinsic Evidence is Unnecessary**

Heal's contract interpretation analysis as gleaned from Appellant's Brief is at odds with the correct analysis as discussed above for several reasons. First, Heal states "[t]he above two conclusions of law ["Findings of Fact and Conclusions of Law, Conclusions of Law Paragraph 7"] are in error and are inconsistent with the clear meaning and unambiguous language of the contract." (Emphasis added). (Appellant's Brief, at p. 16). Furthermore, Heal's introductory phrase to his ARGUMENT, 1A. states: "The Plain Meaning of the Listing Agreement Controls." (Emphasis added). (Appellant's Brief, at p. 18). Accordingly, Heal's position is and must be that the Agreement is unambiguous. Heal further argues that the Agreement must be given its "plain meaning."⁵

Therefore, Heal apparently does not challenge or dispute Conclusion, Paragraph 5 [Only when an ambiguity exists which cannot so be reconciled may resort be had to extrinsic evidence, i.e., the affidavits of Tom Heal relating to the intent of the parties prior to execution of the Agreement and the purpose of the a protection period].⁶ Heal has

⁵ The meaning attributed to a document (usu. by a court) based on a commonsense reading of the words, giving them their ordinary sense and without reference to extrinsic indications of the author's intent. —Also termed ordinary meaning. BLACK'S LAW DICTIONARY, 995 (Seventh ed. 1999).

⁶ If this is indeed Heal's position, then the BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS AND UTAH ASSOCIATION OF REALTORS (hereinafter "Amicus Brief") is superfluous and so is any discussion by Heal in his Brief as to the purpose of the protection period because it is extrinsic evidence. (Appellant's Brief, at pp. 20-23).

never argued and does not now argue that the District Court should have found that the Agreement is ambiguous.⁷ Therefore, the District Court need not resort to any extrinsic evidence to determine the parties' intent. On the contrary Heal relies upon and uses such language as "the Listing Agreement plainly states...", (Appellant's Brief, at p. 18) "...but is governed by the clear language found at the end of Paragraph 2," (Appellant's Brief, at p. 17) "Paragraph 2 of the Listing Agreement clearly states..." (Appellant's Brief, at p. 17), "...the Listing Agreement clearly mandates...,) (Appellant's Brief, at p. 17).

C. Heal's Interpretation of the Agreement Fails to Consider and Harmonize Sections 2 and 3 in the Agreement

The second reason that Heal's analysis of the interpretation of the Agreement is flawed is that it fails to harmonize appropriately paragraphs 2 and 3 in the Agreement. Correct contract interpretation requires that a court "...consider each contract provision...in relation to all of the other with a view toward giving effect to all and ignoring none." *Green River Canal Co., v. Thayne*, 84 P.3d 1134, 1141 (Utah 2003). The first source of any inquiry when a question arises is the document itself which should be looked at in its entirety and in accordance with its purpose and all of its parts should be given effect insofar as that is possible. *Larrabee v. Royal Dairy Products Co.*, 614 P.2d 160 (Utah 1980); *Big Cottonwood Tanner Ditch Co. v. Salt Lake City*, 740 P.2d

⁷ "A contract provision is ambiguous if it is capable of more than one interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.'" *Fairbourne*, at p. 293 citing to *Winegar V Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991). Heal makes no assertion that the Agreement is ambiguous.

1357 (Utah App. 1987); *GGA, Inc. v. Laventis*, 773 P.2d 841 (Utah App. 1989). A contract should be interpreted so as to harmonize all of its provisions. *Jones. v. Hinkle*, 611 P.2d 733 (Utah 1980).

Appellant's Brief and Heal's contract analysis ignores this step. Nowhere in his Brief does Heal address the interrelationship of and specific reference to **Section 2. Brokerage Fee** in Section 3 of the Agreement, (**3. Protection Period**. "...Seller agrees to pay to the Company the brokerage fee stated in Section 2..." with the payment of a commission. Nowhere in Heal's Brief does he discuss the meaning and relationship or duration (i.e., "twenty-four months") of the protection period except to state that it is a "...separate concept..." (Appellant's Brief, at p. 20). In fact, Heal fails to even mention the specific reference in the latter clause to the former in the Agreement except as alluded to in the District Court's Conclusion, Paragraph 5. (Appellant's Brief, at p. 19). Heal simply relies on the expressed purpose of a protection period as outlined and explained in the Amicus Brief. (Appellant's Brief, at p. 19).⁸ Heal's analysis violates the Utah Supreme Court's most recent pronouncement to (1) [fully] consider each provision and (2) "ignore [ing] none." *Fairbourne*, at p. 295. Heal completely ignores this specific

⁸ Heal's analysis focuses solely on the language in **Paragraph 2. Brokerage Fee** in the Agreement that a commission is owed "...on any and all lease renewals at the time of such renewals...on the first day of the lease renewal commencement." (Appellant's Brief, at p. 18). Amicus Curiae deals briefly but indirectly with the "twenty-four month" period. (Amicus Curiae Brief, at p. 9, footnote 1). However, the position of Amicus Curiae ignores Heal's obligation to "expressly and unequivocally" so provide in the Agreement.

reference and fails to consider, discuss or attempt to harmonize the same.

D. The Purpose of the Protection Period is to Relieve Zion's of the Burden of Paying Duplicative/Unearned Commissions

In *Realty World Labrum v. Steadman*, 737 P.2d 165 (Utah 1987) the Utah Supreme Court considered the purpose of a protection period clause in a listing agreement. In *Realty*, the vendor showed the home to the eventual purchaser. (Percival). Then the vendor listed his home for sale with a broker. (Strout) The listing agreement expired by its own terms. The vendor then listed the home with Realty World Labrum. (Hereinafter "Realty"). The Realty listing agreement did not relieve the vendor of a duty to pay Realty a commission if Percival purchased the home. The Realty listing agreement expired. The vendor then entered into a second listing agreement with Strout. That listing agreement contained a tailored protection period clause⁹ drafted by Steadman which the court found and held created a "sham" transaction. *Realty*, at p. 167.

In *Realty*, the Court found that the purpose of a protection period clause is "fashioned to relieve homeowners [and presumably Commercial Landlords—i.e., Zion's] who list their property with a new agent at the expiration of an earlier listing agreement from the burden of paying commissions [or a commission] to both the original and the

⁹ That clause was drafted specifically for the particular situation by the defendant, Steadman, a sophisticated man who held "a doctorate in education and is experienced in real estate transactions; he has successfully completed a real estate course and has passed the test given by the state to persons applying for real estate licenses." *Realty*, at p. 166.

new brokers.” [Or to a broker whose listing agreement expires by its own terms absent specific terms to the contrary.] While the Court in *Realty* found the drafting of the protection period clause to be “poor” it was nevertheless proper for the Court to “give effect to its obvious intent and purpose. *Realty*, at p. 176 citing *Nagle v. Club Fountainbleu*, 405 P.2d 346, (Utah 1965) (holding that such a clause is not designed to allow a homeowner to escape liability and payment of a valid commission by simply waiting for the expiration of the listing agreement).¹⁰

**E. The District Court’s Interpretation of the Agreement as Drafted
by Heal is Fair and Equitable and the Agreement Fails to
Expressly or Unequivocally Provide for the Payment of a
Commission in Perpetuity**

The third reason that Heal’s analysis of the interpretation of the Agreement is flawed is

[W]here there is doubt about the interpretation of a contract, a fair and equitable result will be preferred over a harsh and unreasonable one. And an interpretation that will produce an inequitable result will be adopted only where the contract expressly and unequivocally so provides that there is no other reasonable interpretation to be given it. (Emphasis added).

¹⁰ The holding in *Realty* is based on unique facts not present in this appeal. First, Zion’s already paid Heal a commission. Second, the Agreement does not state and cannot reasonably be read to state that a commission is owed in perpetuity on any lease renewal. Third, there is no reason to believe that this transaction was a sham. The Agreement expired by its own terms on September 23, 1999. (Findings, Paragraph 6). The second lease was executed by Zion’s on April 15, 2003—nearly nine (9) months after expiration of the first lease. (Findings, Paragraphs 7-8).

Green River Canal Co., v. Thayne, 84 P.3d 1134, 1142 (Utah 2003). Assuming *arguendo* that doubt exists with respect to the interpretation of the Agreement, Zion's dealt fairly with Heal and paid a Heal a commission pursuant to the first lease agreement.

(Conclusion, Paragraph 1). Payment of a commission by Zion's is both fair and equitable. However, nothing in the record or the plain meaning or language of the Agreement suggests that Heal properly disclosed or bargained for a "commission in perpetuity under the Agreement."¹¹ Heal as the drafter of the Agreement is in a superior bargaining position, and is held to a higher standard to insure that (a) the terms he wants are in fact included within the Agreement and (b) that such terms are fully disclosed and written clearly and concisely. See Conclusion, Paragraph 7. ("...Heal is the drafter of the Agreement, any ambiguity is construed against the drafter").

Heal's interpretation of the Agreement, if adopted, would elicit an inequitable result for the following reasons. First, the Agreement had already expired by its own terms. Second, Zion's already paid Heal a commission. Third, there is nothing in the record to suggest that Zion's acted in bad faith to avoid payment of an additional

¹¹ Heal could have easily included language in the Agreement that a commission is owed "...on any and all lease renewals [**in perpetuity**] at the time of such renewals...on the first day of the lease renewal commencement." (Appellant's Brief, at p. 18). Even better, Heal could have eliminated any reference to the Brokerage Fee within the Protection Period Clause or extended the protection period for a longer period or indefinitely. Heal's language and characterization of Zion's obligation (i.e., to pay a commission in perpetuity) is subtle at best!

commission¹² or engaged in a sham transaction. Fourth, and most importantly, contrary to Heal's assertion, if Heal failed to draft the Agreement in such a manner as to "unequivocally" provide for a payment of a commission in perpetuity then Heal—not Zion's, should bear the loss.

Both the Appellant and the Amicus Curiae argue that the District Court's interpretation is at odds with the "industry-wide purpose of protection periods." (Appellant's Brief, at p. 18; Amicus Curiae Brief, at pp. 8-9). Such argument misses the point. Payment of a commission in perpetuity may have been Heal's intent. However, unless Zion's knew, understood and mutually assented (to an unequivocal written expression of such intent) to payment of a commission in perpetuity under the Agreement, then the standard in the industry is irrelevant. See *Equitable Life & Cas. Ins. Co. v. Ross*, 849 P.2d 1187 (Utah App. 1993). Zion's position is that the Agreement is unequivocal in stating that Zions is not obligated to pay a commission in perpetuity.

F. The Court Cannot Change the Bargain Between the Parties on the Basis of Supposed Equitable Principles

The fourth reason that Heal's analysis of the interpretation of the Agreement is flawed is "there is a long standing rule [of contract interpretation] in Utah that persons dealing at arm's length are entitled to contract on their own terms without the intervention

¹² In fact, there is nothing in the record or the findings to suggest that Zion's was even aware that Heal claimed he was owed an additional commission, or that the Agreement so provided, until the filing of the complaint on or about August, 2003—nearly two years outside of the protection period identified within the Agreement.

of the courts to relieve either party from the effects of a bad bargain.” *Hal Taylor Associates v. UnionAmerica, Inc.*, 657 P.2d 743, 749 (Utah 1982) citing *Biesinger v. Behunin*, 584 P. 2d 801 (Utah 1978). *See also Tomino v. Greater Park City Co.*, 570 P.2d 698 (Utah 1977) (holding that a court will not rewrite a contract to supply terms which the parties omitted) and *Dalton v. Jerico Construction Co.*, 642 P.2d 748, 750 (Utah 1982) (holding that “[I]t is not for a court to rewrite a contract improvidently entered into at an arm’s length or to change the bargain indirectly on the basis of supposed equitable principles.” (Emphasis added).

Both Heal and Amicus Curiae improperly request that this Court change the bargain entered into by the parties on the basis of supposed equitable principles,¹³ i.e., that the parties’ intent should be gleaned from and inserted into the Agreement by the Court based on the standard in the industry. This Court cannot and should not write a better contract than Heal himself wrote. *See Rio Algom Corp. V. Jimco Ltd.*, 618 O.2d 497, 505 (Utah 1980). The Court cannot do for Heal what Heal himself failed to do. *See Provo City Corp., v. Nielsen Scott Co.*, 603 P.2d 803, 806 (Utah 1979). Heal agrees that “[t]he district court cannot go back, rewrite the agreement....” (Appellant’s Brief, a p. 18).

¹³ Amicus Curiae advance an additional and improper rationale for reversal of the District Court’s opinion based on the equitable doctrine of unjust enrichment. (Amicus Curiae Brief, at pp. 9-10). Unjust enrichment is one branch of the equitable doctrine of *quantum meruit*. *See Olson v. Park-Craig-Olson, Inc.*, 815 P.2d 1356, 1360 (Utah App. 1991). However, any recovery under a quantum meruit theory “presupposes that no enforceable contract exists.” *Davies v. Olson*, 746 P.2d 264, 268 (Utah App. 1990). This Agreement is and has been enforced.

II If this Court Reverses the District Court, Heal may be Entitled to an Award of Attorney's Fees.

Zion's does not disagree that attorney's fees are available under the Agreement. (Appellant's Brief, at p. 25). Similarly, Zion's does not disagree that a provision for payment of attorney's fees in a contract includes attorney's fees incurred by a prevailing party on appeal as well as at trial. (Appellant's Brief, at p. 25). Under any circumstances, contingent upon a reversal by this Court of the District Court's interpretation of the Agreement, any determination as to any amount of fees to which Heal is entitled would be presumably determined on remand and only after entry of proper findings of fact and conclusions of law.

CONCLUSION

The District Court's interpretation of the Listing Agreement as outlined in the parties' and the Court's stipulated findings of fact and conclusions of law is correct. The District Court's decision strictly adheres to established legal precedent in this state regarding contract interpretation. Conversely, Heal's interpretation of the Agreement is either inconsistent with or ignores such precedent. Heal drafted the Agreement and failed to clearly express and unequivocally provide for payment of a commission in perpetuity despite the alleged standard in the industry. Protection periods are to relieve owners/landlords of the burden of paying commissions. If the Court were to adopt Heal's interpretation it would effectively re-write the Agreement and protect Heal when Heal failed to protect himself. Accordingly, this Court should affirm the District Court's

interpretation of the Agreement.

DATED this 26 day of October, 2004.

LAW OFFICE OF STEVEN F. ALLRED, P.C.

Steven F. Allred

Steven F. Allred
Attorney for Appellees

ADDENDUM

Pursuant to Utah Rules of Civil Procedure Rule 24(a)(11) the District Court's Findings of Fact and Conclusions of Law are attached hereto.

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Fourth Judicial District Court
of Utah County, State of Utah
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conference between the parties in which the Court directed the entry of a final judgment as to Zion's, pursuant to Utah Rules of Civil Procedure Rule 54(b), because there is no just reason for delaying Heal's appeal as to Zions, and the Court stayed any further action as to Overton pending the resolution of the appeal. In conjunction with these motions and hearings, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Zion's is a Utah limited liability company, separate and distinct from its members and validly formed on or about February 2, 1997. See Exhibit "A" attached hereto.
2. On or about June 30, 1999, Heal prepared and Zion's executed a "LISTING AGREEMENT AND AGENCY DISCLOSURE," (hereinafter "Agreement") a copy of which is attached hereto as Exhibit "B".
3. The Agreement identifies "the Seller" as "Glen Overton/and his interests."
4. The Agreement provides for a listing period beginning June 23, 1999 and ending on September 23, 1999. (Hereinafter "the Listing Period").
5. Paragraph 2 in the Agreement mandates the payment of commissions to Heal by Zion's for a "lease renewal."
6. Paragraph 3 in the Agreement provides for a protection period to Heal under the Agreement for a period of twenty-four months (hereinafter "the protection period") following the expiration of the Agreement. (September 23, 1999).
7. On or about July 30, 1999, Heal provided Zion's with a tenant, Selnate U.S.A. Co. Ltd., for a three (3) year period. (August 1, 2002).
8. On April 15, 2003, Zion's executed a second Lease Agreement with Selnate U.S.A. Co. Ltd., (hereinafter "lease renewal"), for a period of two (2) years.
9. Heal demanded a commission from Zion's for the lease renewal and Zion's refused to pay said commission on the basis that the lease renewal was entered outside of the expiration of the Agreement and the protection period.

10. Defendant, Glen Overton, (hereinafter "Overton") an individual and member of Zion's resides outside the state of Utah and has been properly served in this action.

FINDINGS OF FACT REGARDING ATTORNEY'S FEES

11. Zion's has submitted the Affidavit of Steven F. Allred in Support of Fees and Costs (hereinafter "Affidavit").

12. The Affidavit requests fees and costs in the amount of \$5061 in conjunction with Zion's motion to dismiss and in opposition to Heal's motion to effect service on Overton by federal express up through and including January 7, 2004.

13. The Affidavit has been supplemented orally and informally by Zion's in the amount of \$2,426.50 for fees and costs incurred with respect to the filing of the premature notice of appeal by Heal and for services incurred in conjunction with the amendment of these findings and an order of the Court through April 22, 2004. Additional fees have been incurred in obtaining entry of an order.

14. Zion's corresponded with Heal on two separate and distinct occasions and attempted unsuccessfully to persuade Heal to dismiss his complaint and appeal or risk being liable for fees and costs pursuant to U.C.A. Section 78-27-56.5

CONCLUSIONS OF LAW

1. Notwithstanding the fact that the Agreement identifies "Glen Overton\AND HIS INTERESTS" as the "Seller" the Agreement was implicitly ratified by Zion's by virtue of Zion's payment to Heal of the commission associated with the execution of the lease between Zion's and Selnate.

2. On April 15, 2003, Zion's entered into a lease renewal with Selnate and such lease renewal was executed outside of the listing period (September 24, 1999) and protection period (September 24, 2001) of the Agreement.

3. The interpretation of a contract is a question of law.

4. The preliminary question in the interpretation of a contract is whether the contract

contains a merger provision. The Agreement does contain such a provision. Accordingly, the presumption is that the Agreement represents the final expression of the parties' intent.

5. The next inquiry is to examine the Agreement as a whole and to determine whether there is an ambiguity which cannot be reconciled by an objective and reasonable interpretation. *See Green River Canal Co. v. Thayn*, 84 P.3d 1134, 1142 (Utah 2003)(citation omitted)(noting that “we interpret “the terms of a contract in light of the reasonable expectations of the parties, looking to the agreement as a whole and to the circumstances, nature, and purpose of the contract”). Only when an ambiguity exists which cannot so be reconciled may resort be had to extrinsic evidence; i.e., the affidavits of Tom Heal relating to the intent of the parties prior to execution of the Agreement and the purpose of a protection period.

6. There is no ambiguity in the Agreement inasmuch as paragraph three (3) in the Agreement specifically references paragraph two (2). When those provisions are harmonized together, not read in isolation to one another as Heal asserts, it is clear that a commission is payable by Zion's to Heal pursuant to the lease renewal only if it arises within the protection period which it does not.

7. Heal's interpretation of the Agreement and specifically the interpretation of paragraph two (2) of the Agreement and its relationship, or lack thereof, to paragraph three (3) of the Agreement is unreasonable. The Agreement does not provide for a commission payment in perpetuity on any lease renewal. Such a commission is only due and owing if it arises within the protection period specified in the Agreement pursuant to a lease renewal. Furthermore, inasmuch as Heal is the drafter of the Agreement, any ambiguity is construed against the drafter.

8. Service of Process by federal express on Overton is acceptable under the circumstances and Heal's motion to serve summons and complaint on Overton pursuant to Rule 4(d)(3)(c) is granted.

9. The Court will treat Zion's motion to dismiss as a motion for summary judgment under Rule 56 of the Utah Rules of Civil Procedure. There are no genuine issues of material fact

which are in dispute. As a matter of law the reasonable interpretation of the Agreement is that no commission is owed by Zion's to Heal on the lease renewal because it arose, if at all, outside of the protection period. Accordingly, the Court grants Zion's motion.

10. The Court grants Heal's Motion to Serve Summons by federal express.

11. The Court certifies this decision as it relates to Zion's Motion to Dismiss and the Court's interpretation of the contract pursuant to Utah Rules of Civil Procedure Rule 54(b). Certification under Rule 54(b) is proper because there are multiple parties to the action, the judgment appealed from would be appealable but for the fact that Overton remains in the action and there is no just reason for delaying Heal's appeal. There is no just reason for delaying Heal's appeal because the other party to the action, Overton, is out of the country for an extended period of time on a work project, resolution of Overton's potential individual liability under the Agreement would cause both sides to incur further costs and attorneys' fees to conduct additional fact finding, and no just reason exists to wait for Overton's return to Utah. Thus, no just reason exists for delaying Heal's appeal as to the holdings in favor of Zion's and the propriety of certification under Rule 54(b).

12. The Court hereby stays the prosecution of this action against Overton pending review of the certified portion of this Order.

CONCLUSIONS REGARDING ATTORNEY'S FEES

13. The Affidavit complies in all respects with Rule 73 of the Utah Rules of Civil Procedure.

14. The fees and costs sought by Zion's in the Affidavit (\$5,061) were reasonable and necessarily incurred by Zion's except for the amount of \$493.00 for Zion's opposition to Heal's motion to effect service on Overton.

15. The fees and costs incurred by Zion's in defending against the filing of Heal's appeal in the amount of \$2,426.50 were reasonable and necessarily incurred by Zion's inasmuch as the notice of appeal was filed prematurely and was not an appealable, final order.

16. The fees and costs incurred by Zion's in the preparation of the Order and these

Findings in the amount of \$1,276.00 were reasonable and necessarily incurred by Zion's.

17. Zion's made reasonable efforts to avoid incurring unreasonable attorney's fees and costs in defending against the lawsuit and the notice of appeal. In exercising its discretion whether to award fees and costs the Court takes into consideration a number of factors including but not limited to the amount at stake, the underlying merits of the complaint and appeal, the equities of the case and the law in Utah with respect to the prevailing party, including whether an award of fees and costs should be done on a piecemeal basis (who won the battle versus who won the war).

18. The Court certifies this decision as it relates to the attorneys' fees owed to Zion's for the same reasons as outlined in paragraph 11.

19. Execution by Zion's on the attorneys' fees is stayed provided that Heal pays into the Court's registry \$9,000.00 or posts a bond in the amount of \$9,000.00 pursuant to Rule 62(i) of the Utah Rules of Civil Procedure and Rule 6 of the Utah Rules of Appellate Procedure in conjunction with any filing of a Notice of Appeal.

20. Pursuant to Rule 7 of the Utah Rules of Appellate Procedure, Heal shall pay into the Court's registry the amount of \$7,500.00, or post a bond approved by the Court as security for costs and attorneys' fees of the appeal within the meaning of Rules 6 and 34 of the Utah Rules of Appellate Procedure.

DATED this 24th of May, 2004.

/S/Derek P. Pullan
Honorable Derek P. Pullan
Fourth District Court Judge

Approved As to Form & Substance:

Allan O. Walsh/Jeremy C. Sink

CERTIFICATE OF SERVICE

I, Steven F. Allred, certify that on October 27, 2004, true and correct copies of the foregoing **BRIEF OF APPELLEES** were filed with the Utah Court of Appeals and served via first-class mail, postage prepaid, to Appellant's counsel, Jeremy C. Sink and counsel for AMICUS CURIAE at the following address:

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LAW OFFICE OF STEVEN F. ALLRED, P.C.

_____

Steven F. Allred
Attorney for Appellees